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No. _____

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IN THE

Supreme Court of the United States

October Term, 1996

ALEX ALVARADO,
Petitioner

v.

EL PASO INDEPENDENT SCHOOL DISTRICT; EL PASO INDEPENDENT SCHOOL DISTRICT BOARD of TRUSTEES; JUDITH W. RIDLEY, H. R. MOYE, BARBARA FORESTER, RICHARD TELLES, and SAL MENA, JR.
Respondents

On Petition for Writ of Certiorari To The United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

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51 pp

QUESTIONS PRESENTED FOR REVIEW

1. Is it a violation of due process for an independent school district to disregard its own rules and regulations and provisions of state law, to the detriment of an employee, when those provisions provide a constitutionally adequate termination procedure for the deprivation of that employee's property interest in employment?

2. Does procedural due process require the use of a "fair decision-making" process?

3. Is it a violation of due process of law for a school district administrator to terminate a school district employee when that administrator does not possess decision-making authority to render a termination decision?

4. Does a violation of due process result when a school district employer violates its own rules and regulations relating to discharge when such provisions manifest an intent to accord the "Presumption of Innocence" to those employees who face discharge for a criminal offense?

5. Was Alvarado given a notice and an opportunity to be heard regarding his discharge which was adequate and appropriate to the nature of his case, within the meaning of the Due Process Clause?

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OFFICIAL AND UNOFFICIAL REPORTS OF OPINIONS

Neither the opinion of the District Court, nor that of the Court of Appeals was officially published. Petitioner's attorney is unaware of any unofficial reports of these opinions.

BASIS FOR JURISDICTION

The judgment sought to be reviewed was entered on March 27, 1997. Petitioner's timely motion for rehearing was overruled on April 22, 1997. Both of these judgments, and the orders upon which they are based, are reproduced in the Appendix. This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. Section 1983, styled "Civil Action for Deprivation of Rights" provides that:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other persons within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the person injured in an action of law, suit in equity, or other proper proceeding for redress, except in any proceeding brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purpose of this section, any Act

of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

On June 1, 1989, El Paso Independent School District ("EPISD") police officers arrested Alex Alvarado, a 13 year bus driver\mechanic employee of the El Paso Independent School District ("EPISD"), for alleged theft of a gallon of gasoline. No one saw Alvarado steal gasoline, but a plain-clothes EPISD police officer accused Alvarado of stealing gasoline after discovering a a gallon container of gasoline, bearing no EPISD label or identifiable characteristics, inside his van. Alvarado's arrest concluded an undercover operation spanning roughly a 10 day period in which his activities were exclusively targeted. The circumstances leading to Alvarado's arrest, as documented by a 38 page record of administrative proceedings compiled by the EPISD, are not disputed.

Upon being notified by co-workers that someone was breaking into his van, Alvarado proceeded to check his van, where he confronted a plain-clothes individual who identified himself as Officer Fred Martinez of EPISD Police Services. Martinez states that "Alvarado demanded to know" why he was at his van, leaving him "no alternative" but to confront Alvarado "with the theft of gasoline." A short while later, Martinez, with the help of two other EPISD officers, escorted Alvarado to the office of Assistant Superintendent Valadez. Mr. Valadez, after being informed of the details, interrogated

Alvarado regarding the theft charge. However, Alvarado would admit to no wrongdoing, and claimed to have purchased the gallon of gasoline found in his van at a local convenience store. After discussing the matter with members of the EPISD police and surveillance team, Valadez decided that the matter would be handled "administratively." As instructed, Alvarado reported to Browder the next day, who, during the course of the next week, met with Alvarado and EPISD police to investigate the theft charge. At no point prior to concluding her investigation did Browder advise Alvarado of the sanction the EPISD intended to implement. Not until the last day of her investigation, June 9th, did Alvarado learn that the EPISD was not seeking a reprimand or suspension, but intended to dispense with a criminal proceeding and use Browder's investigation to terminate his employment. Browder submitted to Assistant Superintendent Jose Ontiveros a memorandum dated June 8, 1989, which stated that it was "in the best interest of the EPISD" to terminate Alvarado's employment with the EPISD. On June 9, 1989, Browder finalized her investigation, and completed a report detailing the nature of her investigation.

By letter dated June 9, 1989, Assistant Superintendent Jose F. Ontiveros informed Alvarado that he was terminating him. His letter does not indicate whether he read, or had access to Browder's June 9th investigative report prior to making his termination decision. It does clarify, however, that Ontiveros never met with Alvarado personally to discuss the theft charge,

and that he did not divulge to Alvarado the reason(s) he relied upon in terminating his employment. Alvarado appealed Ontiveros' termination decision to Superintendent Ronald McLeod and the Board. In both instances, his appeal was denied. Alvarado has attempted to obtain as part of the record of proceedings a copy of the taperecording of the Board appeal. However, the EPISD cannot locate this taperecording.

The district court below has determined that EPISD Board Policy 4123,[1] and V.T.C.A. Education Code Section 13.109,[2] as amended, conferred upon Alvarado a property interest in employment in which he had procedural due process rights. Pursuant to Board Policy 4123, the EPISD superintendent, and those operating under him, were authorized only to suspend an EPISD employee arrested and charged with a felony or crime involving moral turpitude until such time as a disposition had been made of the criminal charge by the "lawful authorities concerned." However, the district court would not address Alvarado's assertion that an unauthorized and sham procedure had been used to effect his employment termination, but ruled instead that Alvarado, at most, was entitled to, and had received, a notice and an opportunity to be heard regarding his employment discharge. The Fifth Circuit affirmed on essentially the same basis.

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1 Appendix, p. 18a

2 Appendix, p. 20a

In its response to Alvarado's Motion for Partial Summary Judgment, the EPISD now admits that Ontiveros considered Alvarado to be an at-will employee when he fired him, and that several non-theft discharge reasons were considered which Alvarado was never told about. Specifically, Ontiveros has stated that "at the time of Alvarado's termination there was evidence of Mr. Alvarado's repeated failure to comply with official directives and established school board policy, repeated and continuing neglect of duties, failure to comply with reasonable requirements of the District, and good cause."

The Board has likewise indicated, in response to Alvarado's "First Request for Admissions to Defendants," that Alvarado's alleged "theft of approximately one gallon of gasoline was a contributing factor to the termination of [his] employment, but denie[s] that it was the sole factor." The evidence it relied upon to support Alvarado's termination on non-theft discharge reasons is a summary judgment affidavit executed by Ontiveros for the Board's benefit. In this affidavit, both the Board and Ontiveros indicate that two earlier personnel actions taken against Alvarado were considered in deciding that his employment should be terminated. One action involved an excessive absences reprimand given Alvarado in 1985; the other a reprimand given him in connection with a propane accident which took place in 1986. These actions were documented in Alvarado's personnel file, and made available to both Ontiveros and the Board during the termination process.

REASONS FOR GRANTING THE WRIT

1. THE DISTRICT COURT'S FAILURE TO CONSIDER WHETHER ALVARADO RECEIVED ADEQUATE AND MEANINGFUL NOTICE AND OPPORTUNITY TO BE HEARD CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

In *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494 (1985), this Court specified the minimum procedural requirements which must be met before a person can be deprived of a property interest in employment. It determined that some type of predeprivation notice and hearing must be afforded to fulfill due process requirements. In reaching this conclusion, the *Loudermill* Court stressed that the basic purpose of a predeprivation notice and an opportunity to be heard was to provide an initial check against the prospect of an erroneous termination decision being made.

The district court in Alvarado's case was not concerned about whether an erroneous termination decision had been made, however. By concluding that Alvarado was entitled, *at most*, to a notice and an opportunity to be heard, it disregarded the fact that Alvarado received *no* notice, or opportunity to be heard regarding *most* of the reasons considered by the EPISD in terminating his employment. Alvarado had no idea that Ontiveros intended to consider alleged evidence of Alvarado's supposed "repeated failure to comply with official directives and established school board policy, repeated and continuing

neglect of duties, [or] failure to comply with reasonable requirements of the District ..." in terminating his employment. He also failed to inform Alvarado that Browder's investigation was not limited to determining whether Alvarado should be suspended or sanctioned in some manner short of termination. It was entirely reasonable for Alvarado to believe, under Board Policy 4123, that Browder was only attempting to determine whether his employment should be suspended, and that any action to terminate his employment would not be initiated until there had been a final disposition of his case by the lawful authorities concerned.

Like Browder and Ontiveros, the Board also failed to give Alvarado notice of its intent to terminate him on non-theft grounds. The record of proceedings establishes that Alvarado had been disciplined on only two occasions during his 13 year career with the EPISD. As indicated above, the first of these was a warning as to excessive absences given him in 1985; the other a reprimand in 1986, as a result of a propane accident. Had Alvarado known that the Board intended to consider two remote-in-time and non-theft related disciplinary actions, he would have been able to demonstrate that these personnel actions were unwarranted and more importantly, that they did not merit his discharge. Clearly, Alvarado did not receive a fair and meaningful opportunity to be heard prior to discharge.

This Court should clarify that *Cleveland Bd. of Educ. v. Loudermill* requires that there be *adequate* and *meaningful* notice and an opportunity to be heard prior to discharge, not just notice and an opportunity to be heard. Alvarado should have been appraised of *all* the discharge reasons considered by the EPISD, and further informed that the procedure initiated against him was a termination procedure designed to displace Board Policy 4123.

2. THE DISTRICT COURT'S DETERMINATION THAT IT WAS PROPER FOR ALVARADO TO BE TERMINATED FOR MISDEMEANOR THEFT, WITHOUT A CRIMINAL TRIAL OR FINDING OF GUILT, CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

Board Policy 4123 specified the process due in Alvarado's case. It required the EPISD to take Alvarado before a magistrate, and from there allow the lawful authorities concerned to prosecute him for misdemeanor theft charge. Unless Alvarado was acquitted, or able to satisfactorily explain the disposition reached, Board Policy 4123, in conjunction with V.T.C.A. Education Section 13.109, contemplated that reinstatement would depend primarily on the outcome of a criminal prosecution. This Board Policy implicitly recognized that initiation of a criminal prosecution was the manner of proving that a criminal offense has been committed.

No other hearing procedure could provide the equivalent of a criminal prosecution. Browder's conferences with Alvarado fell far short of providing the same protection Board Policy 4123 provided. Her conferences did not amount to a hearing procedure, but were more akin to an investigation. Alvarado could not have possibly corrected a wrongful discharge decision since he did not appear before Ontiveros. This might explain why Ontiveros, like the Board, based his termination decision largely on non-theft grounds. Rather than placing the burden on the EPISD to prove Alvarado's guilt of the theft charge, however, Ontiveros improperly shifted to Alvarado the burden of proving his innocence.

This Court recognizes the presumption of innocence applies in civil proceedings which require proof of the commission of an underlying criminal offense. See e.g. *Coffin v. United States*, 156 U.S. 481 (1895), and the cases cited therein. Yet the district court and Fifth Circuit have lightly disregarded this presumption in Alvarado's case, which is traceable as far back as ancient Rome and Deuteronomy. *Coffin v. United States*, 156 U.S. 482, 483. Now, apparently, an employee facing deprivation of a property interest in employment, as a result of a pending criminal charge, can be summarily discharged through an administrative proceeding, so long as there is a notice and opportunity to be heard, irrespective of whether that employee's guilt or innocence of that pending criminal charge is ever established.

Alvarado has been unable to find even one case ever decided in the history of American jurisprudence where an employee's guilt or innocence of a criminal offense has been decided by a procedure other than a criminal process. This is a disturbing notion -- since it recognizes the right of a public employer in general to irreparably destroy all personal, social and business ties and relations an employee has developed over a lifetime, without providing any of the safeguards traditionally associated with proving commission of a criminal offense. It is an essential principle of due process that the deprivation of Alvarado's property interest in employment had to be effected through procedures "appropriate to the nature of [his] case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313, 94 L.Ed.2d 865 (1950). This principle has been completely disregarded in Alvarado's case.

It was unacceptable for Ontiveros and the Board to fire Alvarado without making any finding of his guilt of the gasoline theft charge. To give Alvarado notice that an opportunity to be heard would be provided reference this criminal offense, but then fail to reach any conclusion regarding whether or not he had stolen the gallon of gasoline seized from his van offends traditional notions of fair play and substantial justice. Notice and an opportunity to be heard are *root* requirements of due process. They do not supply all of the process due, however, where the essential question presented is whether a crime of moral turpitude has been committed.

The lower courts should have held that Ontiveros and the Board were required to make some finding of guilt. Their decision to terminate Alvarado because it was not "in the best interest of the EPISD" might suffice as a suspension reason, but it hardly justifies firing Alvarado for theft. Were this the case, an employer could terminate its employees for any reason. In Alvarado's case, this is exactly what occurred, since Ontiveros and the Board have both admitted that Alvarado was terminated in part for non-theft related reasons. Can such a procedure be meaningful or fair? Alvarado believes not, particularly since the record of proceedings in his case suggests that the ad-hoc procedure created for use was intended only to give the appearance of due process. This Court has held on numerous occasions that certain predeprivation procedures require findings of fact. See e.g. *Goldberg v. Kelly*, 397 U.S. 254, 25 L.Ed.2d 287 (1970); and *Gagnon v. Scarpelli*, 411 U.S. 778, 93 S.Ct. 1756, 36 L.Ed.2d 656.

In *Morrisey v. Brewer*, 408 U.S. 471, 92 S.Ct. 2593, 33 L.Ed.2d 484 (1972), for example, this Court held that a parolee facing revocation was entitled to a written statement by the factfinders as to the evidence relied upon and the reasons for revoking parole. No reason for making an exception exists here. As recognized in *Loudermill*, some cases involve factual disputes. Alvarado's case is one such case since "there exist[ed] not just plausible arguments to be made, but also 'substantial

disputes in testimonial evidence." *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 552, 84 L.Ed.2d at 510.

Contrary to the situation presented in *Loudermill*, where one petitioner had falsified a job application, and the other had failed an eye exam, all of the essential facts in Alvarado's case were disputed. Alvarado challenged the veracity of the EPISD's surveillance reports, and argued that he had been arrested for theft only because he had confronted an EPISD police officer illegally searching his van. In accordance with applicable due process principles, some finding of guilt or culpability was plainly necessary to sustain Alvarado's termination for criminal theft. *Greenholtz v. Nebraska Penal Inmates*, 442 U.S. 1, 99 S.Ct. 2100, 60 L.Ed.2d 668 (1979).

3. THE DISTRICT COURT'S FAILURE TO RECOGNIZE THAT PROCEDURAL DUE PROCESS REQUIRES A FAIR DECISION-MAKING PROCESS CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT AND SEVERAL CIRCUIT COURTS.

The district court in Alvarado's case applied a procedural due process analysis in rejecting Alvarado's claim that he had been deprived of a property interest in employment without due process of law. Relying principally on *Shaper v. City of Huntsville*, 813 F.2d 709 (5th Cir. 1983), it held that Alvarado was entitled, at most, only to notice and an opportunity to be heard, notwithstanding Alvarado's contention that the termination procedure he was given was a sham created only to give the appearance of due process. Alvarado submits

that the District Court and Fifth Circuit should have been required to address his contention that a sham procedure was utilized in terminating his employment, as well as the other "fairness" issues presented.

Unlike *Shaper* seems to suggest, this Court in *Fuentes v. Shevin*, 407 U.S. 67, 80-81, 92 S.Ct. 1983, 32 L.Ed.2d 556, 570 (1972), explained that the constitutional right to be heard is a basic aspect of the duty of government to follow **"a fair process of decisionmaking** ..." and that "the purpose of the requirement is not only to ensure abstract **fair play**" ... but **protection from "arbitrary encroachment"** by the State. (emp. added). Justice Powell reiterated the importance of fairness, as part of procedural due process, in *Vitek v. Jones*, 445 U.S. 480, 500, 100 S.Ct. 1254, 63 L.Ed 2d 552, 569 (1980), when he observed that **"The essence of procedural due process is a fair hearing."** (emph. added). The premise and clear implication of the Fifth Circuit's holding in *Shaper* that a fair decision-making process is not a procedural due process concern, but purely one of substantive due process is contrary to the perspective of procedural due process this Court has adopted in *Fuentes, Vitek,* and numerous other decisions.

The district court and Fifth Circuit determination that Alvarado received all the process he was due because he was provided a notice and opportunity to be heard is but a starting point in a procedural due process analysis. These root due process requirements do not address any of the issues Alvarado

contends made the ad-hoc termination process utilized in his case unfair. One such consideration was Assistant Superintendent Ontiveros' clear lack of termination authority. In response to Alvarado's complaint regarding this point, the district court, in its Order Regarding Defendants' Motion to Dismiss, agreed with Alvarado that:

> Regulation 4123 only provides for the suspension, not the discharge, of an employee who is charged with a felony or misdemeanor involving moral turpitude until a disposition has been made of the criminal case by the "lawful authorities concerned." The Regulation provided no authority to the EPISD to discharge an employee who was never convicted of anything. See App., p. 14a (emp. not added).

Yet while recognizing that Alvarado had been terminated without authority, it somehow managed to conclude that Alvarado had been given all the process he was due. Alvarado cannot comprehend how the district court could determine that Alvarado was accorded procedural due process, and at the same time recognize that he had been terminated by an EPISD administrator without decision-making authority. This reasoning not only defies logic; it also disregards the very property interest created by Board Policy 4123, which restricted the authority of the Superintendent and his subordinates to suspending Alvarado, and reserved termination authority to the Board. It also conflicts with the Fifth Circuit's decision in *Jett v. Dallas Independent School Dist*, 7 F.3d 1241, 1245 -1250 (5th Cir. 1993), which established that school district employees

of independent school districts in Texas must be delegated decision-making authority to act on behalf of their employer.

Other aspects of the decision-making process were unfair. The ad-hoc decision-making process created for use in Alvarado's case did not address the merits of the theft charge or Alvarado's complaint that the theft charge was but a pretext to fire him; explain why Alvarado was the only EPISD mechanic shop employee whose activities were targeted prior to his arrest; or require the EPISD to produce credible evidence to support its contention that Alvarado had stolen a gallon of EPISD gasoline. Arguably, the EPISD decided to handle Alvarado's termination "administratively" only because it recognized that the EPISD could not prove the theft charge were the case disposed of by the lawful authorities concerned. The fact that Ontiveros considered Alvarado to be employed on an "at-will" basis and that his "employment could be terminated with or without cause, for any legally permissible reason, or for no reason" at all is still more evidence of the unfairness of the termination procedure used. By this admission, Ontiveros indicates that he did not feel any need to confine his consideration to the gasoline theft charge.

Each of the EPISD Board Members' bias is also evident from their summary judgment affidavits, which state: "*It was my understanding* that Mr. Alvarado was an auxiliary employee employed by the EPISD on an at-will basis." (Italics added). While their unawareness of Alvarado's property interest is

disturbing, their statement, in response to admissions request number five of Alvarado's "First Request for Admissions to Defendants," that Alvarado's alleged "theft of approximately one gallon of gasoline was a contributing factor to the termination of [his] employment," but not "the sole factor" is even more disturbing, since it reveals that the Board did not confine its decision to the gasoline theft charge.

Alvarado cannot ascertain the basis for the district court's failure to address the fairness of the decision-making process provided. He does note, however, that the Fifth Circuit decision in *Shaper v. City of Huntsville*, 813 F.2d 709, appears to deny all 1983 plaintiffs the right to *state a claim* challenging an arbitrary and capricious pretermination procedure, so long as there is a post-termination remedy. Not only does this holding resurrect the "exhaustion of administrative remedies" requirement rejected in *Patsy v. Bd. of Regents*, 457 U.S. 496, 73 L.Ed.2d 172, 102 S.Ct 2557 (1982); it is also contrary to the position taken by nine federal circuits. See e.g. *Newman v. Com. of Mass.*, 884 F.2d 19 (1st Cir. 1989); *Garguil v. Tompkins*, 704 F.2d 661 (2nd Cir. 1983); *Kowtoniuk v. Quarles*, 525 F.2d 1161, 1165 (4th Cir. 1975); *Parham v. Hardaway*, 555 F.2d 139 (6th Cir. 1977); *Philly's v. Byrne*, 732 F.2d 87, 91-92 (1984); *Miller v. Dean*, 552 F.2d 266 (8th Cir. 1977); *Bignall v. North Idaho College*, 538 F.2d 243 (9th Cir. 1976); *Mangels v. Pena*, 789 F.2d 836 (10th Cir.); and *Haberle v. University of Alabama in Birmingham*, 803 F.2d 1536 (11th Cir.

1986). Plainly, the district court should have realized the "decision-making" process in Alvarado's case had to be fair.

4. THE DISTRICT COURT'S FAILURE TO APPLY *MATHEWS V. ELDRIDGE* IN DETERMINING WHAT PROCESS ALVARADO WAS DUE CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Fifth Circuit affirmed the District Court finding that Board Policy 4123, and V.T.C.A. Education Code Section 13.109, as amended, conferred upon petitioner Alvarado a protected property interest in his employment. These provisions required, inter alia, that the E.P.I.S.D. refrain from terminating Alvarado's employment until his theft charge had been "disposed of by lawful authorities concerned" and a "conviction" obtained. Despite these requirements, the district court found that Alvarado had received all the process he was due even though this process did not comply with Board Policy 4123's judicial pretermination procedure, or V.T.C.A. Section 13.109's criminal conviction requirement.

It based its decision on the Fifth Circuit's decisions in *Levitt v. University of Texas at El Paso*, 759 F.2d 1224 (5th Cir. 1985), and *Franceski v. Plaquemines Parish School Bd.*, 772 F.2d 197 (5th Cir. 1985). These cases establish that predeprivation notice and opportunity to be heard satisfies the due process "constitutional minimum" in all employment termination cases, except those where a plaintiff can show that there was an addition to the "constitutional minimum" because he was deprived of the "constitutional minimum" itself or

suffered an independent constitutional deprivation. Neither situation was presented here. Alvarado's was not denied a "constitutional minimum" as understood by the Fifth Circuit; nor could he show an independent constitutional deprivation.

Alvarado nonetheless contends that the Fifth Circuit decisions the district court relied upon in denying him relief are misguided. He asserts that the proper procedure for conducting a due process analysis was not followed. In the first place, he rejects the premise in *Levitt* and *Plaquemines* that a due process "constitutional minimum" exists in the analysis of employment termination cases. Contrary to the *Levitt* Court's reading of *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 105 S.Ct. 1487, 84 L.Ed.2d 494(1985), this Court decided in *Loudermill* that predeprivation notice and opportunity to be heard was constitutionally required where an employee faces deprivation of a protected property interest in employment. It did not establish the existence of a constitutional minimum applicable to every termination case, however.

This Court left the adequacy of the procedure to be determined on a case-by-case basis, after noting that the "formality and procedural requisites for the hearing can vary," and that "*In general*, 'something less' than a full evidentiary hearing is sufficient prior to adverse administrative action." (emph. added). *Loudermill*, 470 U.S. at 545. *Loudermill* thus recognized that "Due process, unlike some legal rules, in not a technical conception with a fixed content unrelated to time,

place and circumstances," *Cafeteria Workers v. McElroy,* 367 U.S. at 886, 6 L.Ed.2d 1230 (1961), but "flexible and calls for such procedural protection as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 33 L.Ed.2d 484 (1972). Its holding is consistent with the guiding principle that any procedure selected must be "appropriate to the nature of the case" under decision. *Mullane v. Hanover Central Bank & Trust, Co.,* 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865, (1950). Its holding also recognizes that "[t]he very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation." *Cafeteria Workers v. McElroy*, 367 U.S. 886, 6 L.Ed.2d 1230 (1961).

Through *Levitt*, the district court was able to disregard the due process balancing test enunciated in *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18, 96 S.Ct. 893 (1976), and replace it with a ministerial test. Its determination that Alvarado at most, was entitled to predeprivation notice and an opportunity to be heard, plainly ignores *Mathews.* Under *Mathews,* the district court should have declared Board Policy 4123 the process due in Alvarado's case. No one can dispute the importance of Alvarado's private interest in his employment. He had been employed with the EPISD for 13 years, and had acquired important wage and fringe benefits.

Mathews' second balancing factor -- the risk of erroneously being deprived of his job through the procedures used, and the probable value, if any of additional or substitute

procedural safeguards -- also weighed in Board Policy 4123's favor. Its judicial pretermination procedure provided far more assurance to Alvarado that an erroneous termination would be avoided than did the ad-hoc termination procedure created for use in his case. Impartial lawful authorities would have ensured that a proper disposition of the criminal theft charge resulted. These authorities were capable of determining whether the EPISD's search of Alvarado's van was illegal, and the unmarked gasoline container with gasoline admissible as proof of any wrongdoing. See e.g. *O'Connor v. Ortega*, 480 U.S.709, 94 L.Ed.2d 714 (1987); *Powell v. Zuckert*, 366 F.2d 634 (D.C.Cir. 1966). Browder, on the other hand, lacked the necessary skill and competence to decide the merits of the criminal theft charge, and search and seizure issues presented.

The last *Mathews* factor -- the EPISD's interest, to include the fiscal and administrative burdens imposed -- also favored use of Board Policy 4123's termination procedure. Under its provisions, the EPISD faced minimal administrative and fiscal burdens since the lawful criminal authorities would have decided Alvarado's guilt or innocence of the criminal theft charge. The Board would have primarily directed its inquiry toward resolution of the reinstatement issue, not Alvarado's guilt or innocence of the theft charge. Following such a procedure would have alleviated the need of the EPISD to conduct the numerous conferences convened in Alvarado's case. In the event of a lengthy delay, Board Policy 4123 also allowed

the EPISD to suspend Alvarado with or without pay, pending outcome of the criminal theft charge. No acceptable reason therefore exists for permitting the EPISD to disregard Board Policy 4123's pretermination procedure.

The district court's observation that "There is not a violation of due process every time a university or other government entity violates its own rules" and that "Such action may constitute a breach of contract or violation of state law, but unless the conduct trespasses on federal constitutional safeguards, there is no constitutional deprivation" may well be true; however, this abstract observation provides no guidance regarding whether a violation of a state law or agency procedure trespasses upon constitutional safeguards. Alvarado has maintained all along that the district court's refusal to comply with the judicial pretermination procedure applicable to him trespassed upon constitutional safeguards. His contention should be addressed.

In *Board of Regents v. Roth*, 408 U.S. 564, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972), this Court identified the two step procedure which is to be applied in the analysis of a due process case:

> a weighing process has long been a part of any determination of the form of hearing required in particular situations by procedural due process. **But, to determine whether due process requirements apply in the first place**, we must look not to the "weight" but to the *nature* of the interest at stake....We must look to see if the inter-

> est is within the Fourteenth Amendment's protection of liberty and property. Id., 408 U.S. at 570-571.

The district court's reliance upon *Levitt* and *Plaquemines* is thus misplaced. These cases rely on decisions which do not involve the Due Process Clause. In *Garrett v. Mathews*, 625 F.2d 658 (5th Cir. 1980), for example, the plaintiff was not terminated from his employment, and therefore suffered no deprivation of a property interest or "loss of substantial due process rights." Accordingly, no need existed to go to the second step and determine what process was due. *United States v. Caceres*, 440 U.S. 741, 99 S.CT 1465, 59 L.Ed.2d 733 (1979) presented a similar situation. In *Caceres*, the Internal Revenue Service's failure to comply with its own agency regulations was excused after this Court concluded that the Due Process Clause was not implicated, and noted that the "rationale" of its holding was "plainly inapplicable to [due process] cases." *Id.* 440 U.S. at 753 and f.n. 15. *Levitt's* extensive discussion of *Jeffries v. Turkey Run Consolidated School Dist.*, 492 F.2d 1, 3-4 (7th Cir. 1974), is also misplaced.

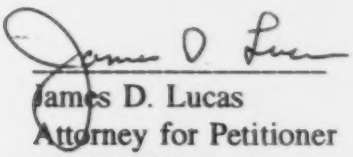
As in *Garrett* and *Caceres*, the plaintiff could not show a due process violation had occurred since she was unable, in the first instance, to show a property or liberty interest deprivation. The Fifth Circuit's failure to distinguish between due process and non-due process cases muddles this Court's perception of due process. By focusing exclusively on whether notice and hearing was provided (a so-called "constitutional

minimum"), the Fifth Circuit fails to take into account the dimensions and contours of the property interest under consideration, to include whether termination regulations and procedures make up part of that property interest.

CONCLUSION

Loudermill established that once a property interest has been conferred, a school district board of trustees or the legislature may not constitutionally authorize the deprivation of that property interest without appropriate procedural safeguards. By rejecting the "bitter with the sweet" approach, however, this Court did not authorize school districts, to the detriment of an effected employee, to depart from published termination procedures which are constitutionally adequate, and substitute in their place unauthorized procedures, simply because a notice and opportunity to be heard had been provided. Where this occurs, close scrutiny of the fairness and meaningfulness of the substituted procedure is warranted. Since no such inquiry was made in the present case, Alvarado respectfully submits this Petition for Writ of Ceriorari should be granted.

Respectfully Submitted,



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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50793
Summary Calendar

U.S. COURT OF APPEALS
FILED
MARCH 27, 1997
CHARLES R. FUBRUGE III
CLERK

ALEX ALVARARO,
Plaintiff - Appellant

versus

EL PASO INDEPENDENT SCHOOL DISTRICT, ET. AL.,
Defendants,
EL PASO INDEPENDENT SCHOOL DISTRICT, ET. AL.,
Defendants - Appellees

Appeal from the United States District Court
for the Western District of Texas
(EP-91-CV-357

Before SMITH, DUHE, and BARKSDALE, Circuit Judges.
PER CURIAM:

The plaintiff, a former employee of the defendant school district, brought this 42 U.S.C. Sec. 1983 action to challenge his termination. Having examined the briefs, pertinent portions of the record, and the applicable law, we affirm, essentially on the basis of the Order Regarding the Defendants' Motion for Summary Judgment entered by the district court on September 12, 1996.

AFFIRMED.

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*Pursuant to 5th Cir. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th Cir. R. 47.5.4.

/s/ J. Smith, Duhe, R. Barksdale

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 96-50793

ALEX ALVARADO

Plaintiff - Appellant

v.

EL PASO INDEPENDENT SCHOOL DISTRICT, ET. AL.,

Defendants

EL PASO INDEPENDENT SCHOOL DISTRICT; EL PASO INDEPENDENT SCHOOL DISTRICT BOARD OF TRUSTEES; JUDITH W. RIDLEY, Individually and as a Member of the El Paso Independent School District Board of Trustees; H. R. MOYE, Individually and as a Member of the El Paso Independent School District Board of Trustees; BARBARA FORESTER, Individually and as a Member of the El Paso Independent School District Board of Trustees; RICHARD TELLES, Individually and as a Member of the El Paso Independent School District Board of Trustees; and SAL MENA, Individually and as a Member of the El Paso Independent School District Board of Trustees;

Defendants - Appellees

U.S. COURT OF APPEALS
FILED
APRIL 22,1997
CHARLES R. FULBRUGE III
CLERK

Appeal from the United States District Court for the
Western District of Texas, El Paso

ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC

(Opinion March 27, 1997, 5th Cir., _____, _____ F. 3d _____)

Before SMITH, DUHE' and BARKSDALE, Circuit Judges.

PER CURIAM:

(x) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be pooled on Rehearing En Banc, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service not having voted in favor, (FRAP and Local Rule 35) the Suggestion for Rehearing En Banc is also DENIED

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Barksdale

_____
United States Circuit Judge

REHG-4

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ALEX ALVARADO, Plaintiff,	)	
v.	)	NO. EP-91-CA-357-H
EL PASO INDEPENDENT SCHOOL DISTRICT, et. al. Defendants	)	FILED SEP 11 4:23 PM '96

JUDGMENT

In accordance with the order regarding Defendants' motion for summary judgment this day entered in the above-styled and numbered cause,

It is ORDERED, ADJUDGED and DECREED that judgment be, and it is hereby, ENTERED for the Defendants, and that the Plaintiff take nothing by his suit. All costs herein incurred are taxed against the Plaintiff, for all of which let execution issue.

SIGNED AND ENTERED this 11th day of September, 1996.

/s/ Harry Lee Hudspeth

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ALEX ALVARADO, Plaintiff,	)	
v.	)	NO. EP-91-CA-357-H
EL PASO INDEPENDENT SCHOOL DISTRICT, et. al. Defendants	)	

ORDER REGARDING THE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This is a civil rights action pursuant to 42 U.S.C. Sec. 1983 alleging the deprivation of property interests without the due process of due process of law. The Defendants have moved for summary judgment pursuant to Fed. R. Civ. P. 56 and Local Court Rule CV-7. Plaintiff and Defendants agree there is no genuine issue of material fact, and the Court, having considered the summary judgment evidence, finds that the Defendants are entitled to judgement in their favor as a matter of law.

The facts may be stated briefly as follows: Defendant El Paso Independent School District ("EPISD") employed Plaintiff Alex Alvarado as a mechanic from 1976 until September 26, 1989. On June 1, 1989, Officer Fred Martinez of the EPISD police services searched the Plaintiff's van as part of a surveillance program to combat petty theft of school property. During the search, Martinez found a gallon of gasoline which he believed had been stolen from the EPISD. Martinez arrested

the Plaintiff on suspicion of theft and took him before Rudolph Valadez, then the Assistant Superintendent for Support Services. Valadez declined to initiate a criminal complaint against the Plaintiff, opting instead to initiate a personnel action. Valadez conducted a conference with the Plaintiff and the Security Police Officers responsible for gathering the evidence of theft. The Plaintiff was informed of the allegations and given an opportunity to tell his side of the story. After the conference, Valadez referred the Plaintiff's case to the EPISD personnel department with a recommendation that the Plaintiff's employment be terminated.

Plaintiff met with the District's Director for Support Service and Facilities Personnel, Barbara A. Browder, four times between June 2 and June 9, 1989. At these conferences, the Plaintiff was again presented with the evidence against him and given an opportunity to respond to the theft allegation. In addition, the Plaintiff was accompanied at these meetings by his union representative. At the conclusion of the meetings, Browder recommended termination of the Plaintiff's employment to Jose F. Ontiveros, the Assistant Superintendent for Personnel, who accepted the recommendation and terminated the Plaintiff's employment effective June 9, 1989.

Through his representative and according to EPISD guidelines, Plaintiff appealed the termination decision to Superintendent Ronald K. McLeod on June 16, 1989. After and August 1 meeting between the Plaintiff, his representative and

the Superintendent, at which the Plaintiff was again allowed to tell his side of the story, the Superintendent upheld the decision to terminate the Plaintiff's employment.

Plaintiff then appealed the Superintendent's decision upholding the termination to the EPISD Board of Trustees. The Board conducted an administrative hearing regarding the Plaintiff's employment termination on September 26, 1989. Prior to the hearing, the Plaintiff was advised in writing of his rights at the hearing including: the right to be present; the right to be represented by counsel or the representative of his choice; the right to cross examine any witness who might testify; the right to testify on his own behalf or present witnesses; the right to review all relevant documents and review the EPISD's witness list. After the hearing, at which the Plaintiff elected not to testify except in response to one question, the Board voted to uphold the plaintiff's employment termination.

The Plaintiff's due process claim relies upon his having a property interest in his continued employment. *Bishop v. Wood*, 96 S.Ct. 2074, 2076 (1976). To have a property interest within the meaning of the Fourteenth Amendment, the Plaintiff must have a legitimate claim or entitlement to a benefit under state or federal law. *Leis v. Flynt*, 99 S.Ct. 698, 701 (1979); *Neuwirth v. Louisiana State Bd. Of Dentistry*, 845 F.2nd 553, 557 (5th Cir. 1988) An employee may have a property interest in his continued employment if the interest is found in a state statute, a local ordinance, a rule, or a mutually explicit

understanding. *Bishop v. Wood*, 96 S.Ct. at 2077; *Conley v. Board of Trustees of Grenada County Hosp.*, 707 F. 2nd 175, 179 (5th Cir. 1983). In the instant case, the Plaintiff alleges that he had a protected property interest in his job by virtue of the EPISD Board Policy and Administrative Regulation 4123 ("Regulation 4123"), which governs the separation of all personnel employed by the EPISD.

Under Texas law, the Board of Trustees has the authority to "adopt such rules, regulations, and by-laws as they may deem proper." TEX. EDUC. CODE ANN. Sec. 23.26 (d) (current version at TEX. EDUC. CODE ANN. Sec. 11.151 (d); *Eugene v. Alief Indep. Sch. Dist.*, 65 F. 3d 1299, 1304 (5th Cir. 1995). The Board properly adopted Regulation 4123, which provides: "The Board of Trustees has the power to dismiss any employee as outlined in [TEX. EDUC. CODE ANN. Sec. Sub. Sec. 13.109 and 13.110]. Any hearing or appeal must follow the procedure outlined in [TEX. EDUC. CODE ANN. Sec. Sub. Sec. 13.112 and 13.115]." Though the referenced sections of the Texas Education Code clearly were intended to apply to only teachers, the EPISD amended the sections by making them applicable to "any employee." Regulation 4123, which also includes "lawful cause" language, creates a protected property interest for the Plaintiff in which he has procedural due process rights. See *Schapper v. City of Huntsville*, 813 F. 2nd 709, 713-14 (5th Cir. 1987) ; see also *Findeisen v. North E. Indep. Sch. Dist.*, 749 F. 2nd 234, 237 (5th Cir. 1984), cert. Denied,

105 S.Ct. 2657 (1985). "[T]he question remains what process is due." *Morrissey v. Brewer*, 92 S.Ct. 2593, 2600 (1972).

The essential elements of due process to which the Plaintiff was entitled prior to the termination of his employment were notice and an opportunity to respond. *Cleveland Bd. Of Educ. V. Loudermill*, 105 S.Ct. 1487, 1495 (1985); *Schaper V. City of Hunstville*, 813 F. 2d 709, 714 (5th Cir. 1987). At most, the Plaintiff "is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story." *Cleveland Bd. Of Educ. V. Loudermill*, 105 S.Ct. At 1495. In the instant case, the Plaintiff was given the process he was due; he received notice of his employment termination and was given the opportunity to respond.

Plaintiff's contention that EPISD's failure to follow its own procedure resulted in a federal violation of due process is misguided. "There is not a violation of due process every time a university or other government entity violates its own rules. Such action may constitute a breach of contract or violation of state law, but unless the conduct trespasses on federal constitutional safeguards, there is no constitutional deprivation." *Levitt v. University of Texas at El Paso*, 759 F. 2d 1224, 1230 (5th Cir. 1985). See Also *Franceski v. Plaquemines Parish School Bd.*, 772 F. 2d197, 200 (5th Cir. 1985). EPISD may have violated its own rules and regulations, but it gave the

Plaintiff all the process he was due under the Constitution and laws of the United States.

It is therefore ORDERED that the Defendants' motion for summary judgment in the above styled and numbered cause be, and it is hereby, GRANTED.

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS

ALEX ALVARADO, Plaintiff,	)	
v.	)	NO. EP-91-CA-357-H
EL PASO INDEPENDENT SCHOOL DISTRICT, et. al. Defendants	)	FILED DEC 18 3:00PM '95

ORDER REGARDING DEFENDANTS' MOTION TO DISMISS

This is a civil rights action pursuant to 42 U.S.C Sec. 1983 alleging the deprivation of property and liberty interests without due process of law. The Defendants have moved for the dismissal of the entire cause of action for failure to state a claim upon which relief can be granted pursuant to FED. R. CIV. P. 12 (b) (6). After reviewing the motion and the response, the Court will grant the motion in part and deny it in part. The facts relevant to this motion are as follows:

Plaintiff Alex Alvarado was employed as a mechanic with Defendant El Paso Independent School District ("EPISD") from 1976 until September 26, 1989. On June 1, 1989, Officer Fred Martinez of the EPISD police services searched the Plaintiff's van. During the search, Martinez found a gallon of gasoline which he believed had been taken from the EPISD. Martinez arrested the Plaintiff on suspicion of theft and took

him before Rudolph Valadez, then the Assistant Superintendent for Support Services. Valadez declined to initiate a criminal complaint against the Plaintiff, opting instead to initiate and administrative personnel action.

On June 7, 1989 Barbara Browder, then Director for Support Personnel, held an informal hearing regarding the incident and recommended that the EPISD discharge Alvarado for his involvement in the alleged theft Jose Ontiveros, then Assistant Superintendent for Personnel, and Ron McLeod, then Superintendent of the EPISD, approved Browder's recommendation. The Plaintiff appealed the decision and the EPISD Board of Trustees ("the Board") conducted and administrative hearing on September 26, 1989. The Board approved the Plaintiff's discharge the next day. The Plaintiff filed the instant action on September 25, 1991.

The Defendants contend that all of Alvarado's actions are barred by the applicable two year statute of limitation. **See Henson-El v. Rogers,** 923 F. 2d 51, 52 (5th Cir. 1991), **cert. denied**, 111 S.Ct. 2863 (1991). However, the Defendants' argument is misplaced. Federal law determines when a Sec. 1983 action accrues, **Murphy v. Kellar**, 950 F 2d 290, 292 n.5 (5th Cir. 1992), and in the Fifth Circuit, a Sec. 1983 cause of action accrues when a plaintiff knows or has reason to know of the injury which is the basis of the action. **Jackson v. Johnson**, 950 F 2D 263, 265 (5th Cir. 1992). In the instant case, the cause of action accrued when the EPISD's decision to

discharge Alvarado became final. **See Jackson**, 950 F 2d at 265. Alvarado's discharge became final on September 27, 1989; therefore, he had until September 27, 1991 to file his complaint. The complaint was filed on September 25, 1991, within the two year statue of limitations. The Plaintiff first claims that the Defendants deprived him of a protected property interest without due process of law. To survive a motion to dismiss the Plaintiff must show that he had a protected property interest in his job with the EPISD. **Griffith v. Johnston,** 899 F 2d 1427, 1435 (5th Cir. 1990, **cert. denied**, 111 S.Ct. 712 (1991). To have a property interest within the meaning of the Fourteenth Amendment, the Plaintiff must have a legitimate claim or entitlement to a benefit under state of federal law. **Leis v. Flynt**, 99 S.Ct. 698, 701 (1979); **Neuwirth v. Louisiana State Bd. Of Dentistry**, 845 F 2d 553, 557 (5th Cir. 1988). An employee may have a property interest in his continued employment if the interest is found in a state statue, a local ordinance, a rule, or a mutually explicit understanding. **Bishop v. Wood**, 96 S.Ct. 2074, 2077 (1976); **Conley v. Board of Trustees of Grenada County Hosp.**, 707 F. 2d 175, 179 (5th Cir. 1983). In the end, state law governs whether an employee has a property interest in his job. **Williams v. Texas Tech Univ. Health Science Ctr.**, 6 F 3d 290, 293 (5th Cir. 1993). **cert. denied sub nom.**, **Williams v. Saltzein**, 114 S.Ct. 1301 (1994). In the instant case, the Plaintiff alleges that he had a protected property interest in his job by virtue of the

EPISD Board Policy and Administrative Regulation 4123 ("Regulation 4123).

Under Texas law, the Board has the authority to "adopt such rules, regulations, and by-laws as they may deem proper." Tex. Educ. Code Ann. Sec. 23.26(d); **Jett v. Dallas indep. Sch. Dist.**, 7 F.3d 1241, 1245 (5th Cir. 1993). The Board properly adopted Regulation 4123, and it governs the separation of all personnel employed by the EPISD. Regulation 4123 provides in pertinent part, that: "The Board of Trustees has the power to dismiss any employee as outlined in [Tex. Educ. Code Ann. Section 12.112 and 13.115]." By explicitly referring to Sections 13.109 and 13.110, Regulation 4123, which also includes "lawful clause" language, creates a protected property interest in employment for the Plaintiff in which has procedural due process rights. **See Schaper v. City of Huntsville**, 813 F. 2d 709, 713-14 (5th Cir. 1987); **see also Findeisen v. North E. Indep. Sch. Dist.**, 749 F. 2d 234, 237 (5th Cir. 1984), **cert. denied**, 105 S.Ct 2657 (1985).

Regulation 4123 only provides for the suspension, not discharge, of an employee who is charged with a felony or misdemeanor involving moral turpitude until a disposition has been made of the criminal case by the "lawful authorities" concerned." The Regulation provides no authority to the EPISD to discharge an employee who was never convicted of anything. According to Regulation 4123, the only lawful reasons the plaintiff could have been discharged are fully

encompassed by Tex. Educ. Code Ann. Sections 13.109 and 13.110. Thus, the Plaintiff claims that by discharging him without first ensuring that his criminal theft case had been disposed of by the "lawful authorities concerned," and by not complying with Tex. Educ. Code Ann. Sections 13.109 and 13.110, the EPISD violated Regulation 4123, hereby violating his procedural due process right. The Plaintiff has stated a claim which is sufficient to survive a motion to dismiss under rule 12(b)(6).

The Plaintiff next claims that the Defendants deprived him of a protected liberty interest by not allowing him the opportunity to clear his name of the theft charges and by ratifying the unreasonable search of his van. In circumstances such as these, Alvarado does have a protected liberty interest which affords him procedural due process rights. **Rosenstein v. City of Dallas**, 876 F. 2d 392, 395 (5th Cir. 1989), **Aff'd**, 901 F.2d 61 (5th Cir. 1990) (en banc)(per curiam), **cert. denied**, 111 S.Ct. 153 (1990). Under these circumstances, in order to state a claim for the deprivation of a liberty interest the Plaintiff must allege: (1) he was a public employee; (2) he was discharged, (3) the employer made stigmatizing charges against him in connection with the discharge, (4) the charges were false, (5) the charges were made public , (6) he requested a hearing to clear his name, and (7) the request was denied. **Arrington v. County of Dallas**, 970 F. 2d 1441, 1447 95th Cir. 1992).

It is undisputed that Alvarado was a public employee who was discharged. However, the Defendants' argue that Alvarado has failed to make out a *prima facie* case of deprivation of his protected liberty interest. This Court agrees. First, Alvarado has not alleged that any Defendant has made the theft charges public. In addition, he has not alleged that he was denied a hearing he requested. In fact, Alvarado admits he was granted a hearing, although he claims it was deficient. Unfortunately for the Plaintiff, the hearing he was granted complied with all the procedural due process guarantees that the law affords. **See Cleveland Bd. of Educ. v. Loudermill**, 105 S.Ct. 1487, 1495 (1985). Therefore, Alvarado's claim for a deprivation of his protected liberty interest of being afforded an opportunity to clear his name must be dismissed.

Finally, Alvarado alleges that the Defendants discharged him in violation of the Equal Protection Clause of the Fourteenth Amendment and the Privileges and immunities Clause of Art. IV, Sec. 2 of the Constitution. The Court finds that dismissal is appropriate for these claims. The Equal Protection Clause comes into play only when the challenged governmental action classifies or distinguishes between two or more identifiable and relevant groups of people. **Qutb v. Strauss**, 11 F 3d 488, 492 (5th Cir. 1993) cert. denied, 114 S.Ct. 2134 (1994). Alvarado does not allege that he is a member of any group which has been singled out for different treatment. Therefore, the Equal Protection"Clause is

inapplicable to this case and this claim must be dismissed. The Privileges and Immunities Clause insures that a citizen of State A who ventures into State B will enjoy the same privileges that a citizens of States B enjoys. **Supreme Court of Va v. Friedman**, 108 S.Ct. 2260, 2264 (1988). In the instant case, Alvarado does not allege that he was a citizen of a state other than Texas, and therefore, this claim must be dismissed.

It is therefore ORDERED that the Defendants' motion to dismiss the Plaintiff's claim for: (1) depriving him of a protected liberty interest in clearing his name, (2) violation the equal protection clause of the Fourteenth Amendment, and (3) violation the Privileges and Immunities Clause of Art. IV, Sec. 2 of the Constitution in the above styled and numbered cause be, and it is hereby, GRANTED.

It is further ORDERED that the defendants' motion to dismiss the Plaintiff's claim that he was deprived of a protected property interest in the above styled and numbered cause be, and it is hereby, DENIED.

SIGNED AND ENTERED this 18th day of December, 1995.

/s/ Harry Lee Hudspeth

HARRY LEE HUDSPETH
UNITED STATES DISTRICT JUDGE

RESIGNATION AND DISMISSAL - 4123*

Personnel shall be permitted to offer resignations to the Board of Trustees by giving the assistant superintendent for personnel two weeks' notice of such intention in writing. However, contracted personnel are expected to honor the terms of their contracts. Acceptance of resignations of contracted personnel who have not served out their contracts will be considered only when requests for resignation are made under the most extenuating of circumstances. It is the prerogative of the Board to accept or reject resignation of any employee who has not completed a contract.

An employee who has been placed on probation under the continuing contract law as outlined in the Texas Education Code, Chapter 13, subchapter C, Section 13.110, shall be notified by the superintendent immediately upon being placed on probation. Any hearing or appeal must follow the procedure as outlined in the Texas Education Code.

The Superintendent has the duty to suspend without pay any employee upon evidence of incompetence, misconduct, or moral delinquency (Section 13.113 of the Texas Education Code). All cases of suspension will be reported to the Board of Trustees at the next meeting.

The Board of Trustees has the power to dismiss any employee as outlined in the Texas Education Code, Chapter 13, Subchapter C, Sections 13.109 and 13.110. Any hearing or appeal must follow the procedure as outlined in the Texas Education Code, Chapter 13, Subchapter C, Section 13.112 ad 13.115.

Any employee who is arrested and charged with a felony or misdemeanor involving moral turpitude may be subject to immediate suspension without pay until a disposition has been made of the criminal case by the lawful authorities concerned.

The decision to suspend an employee without pay shall be based upon the decision by the superintendent of whether or not the pending criminal charge would affect the ability of the employee to effectively perform the assigned duties and/or if the suspension would be in the best interest of the school district. Any decision to suspend without pay by the superintendent is appealable to the Board of Trustees if the employee files a written request within five days after notice of the suspension requesting a hearing before the Board of Trustees. When the superintendent has been notified of the disposition of any criminal charge against an employee and when the employee has requested reinstatement of employment with the EL Paso Independent School District, the superintendent shall then determine whether or not to reinstate the employee. If the superintendent declines to reinstate the employee after the disposition of the criminal charge, the employee has a right to a hearing before the Board of Trustees if he files a written request within five days after the notice by the superintendent of the decision not to reinstate the employee. In any case, the Board of Trustees has the ultimate authority to determine whether to terminate the employee effective with the beginning of any suspension or to reinstate the employee to duty at any time.

*Since the employee handbook containing this provision did not identify it as a Board Policy or Administrative Regulation, Alvarado and the district court have referred to it as Regulation 4123 and Administrative Regulation 4123. However, since the EPISD has now clarified that this provision should be referred to as a Board Policy 4123, Alvarado identifies this provision in his Petition for Certiorari as Board Policy 4123.

DISCHARGE DURING YEAR - V.T.C.A. 13.109

Any teacher, whether employed under a probationary contract or a continuing contract, may be discharged during the school year for one or more of the following reasons, which shall constitute lawful cause for discharge:

(1) immorality;

(2) conviction of any felony or other crime involving moral turpitude;

(3) drunkenness;

(4) repeated failure to comply with official directives and established school board policy;

(5) repeated and continuing neglect of duties.

Amended by Acts 1971, 62nd Leg., p. 1476 ch. 405, Sections 2, 54(1).